

Nov 09, 2017

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEN MAX MCKAY,

Defendant.

No. 1:16-CR-02069-SMJ

**ORDER ADOPTING REPORT
AND RECOMMENDATION,
SETTING SENTENCING, AND
ESTABLISHING SENTENCING
BRIEFING SCHEDULE**

Before the Court is Magistrate Judge Dimke's November 8, 2017 Report and Recommendation, ECF No. 39, recommending that the Court find Defendant is competent to plead guilty, there is a factual basis for Defendant's plea of guilty, that the plea was entered voluntarily and with full knowledge of the consequences, and that the plea did not result from force, threats or promises (other than promises in the Plea Agreement). After reviewing the Report and Recommendation and relevant authorities, the Court finds the Magistrate Judge's findings are correct. Therefore, the Court adopts the Report and Recommendation in its entirety.

Accordingly, **IT IS HEREBY ORDERED:**

1. The Report and Recommendation, **ECF No. 39**, is **ADOPTED** in its entirety.

1 2. The Court finds that Defendant's guilty plea to Assault Resulting in
2 Serious Bodily Injury, 18 U.S.C. §§ 113(a)(6), 1153, is knowing,
3 intelligent, and voluntary and is not induced by fear, coercion, or
4 ignorance. The Court finds this plea is given with the knowledge of
5 the essential elements of the charged offense, the Government's
6 evidence of the charged offense, and the consequences of pleading
7 guilty. The Court further finds that the facts admitted to by Defendant
8 in open court constitute the essential elements of Assault Resulting in
9 Serious Bodily Injury, 18 U.S.C. §§ 113(a)(6), 1153.

10 3. Defendant's guilty plea to the charges in the indictment, ECF No. 1, is
11 **ACCEPTED.**

12 4. All pending motions are **DENIED AS MOOT.**

13 5. The trial date is **STRICKEN.**

14 6. In the event an Order is entered permitting withdrawal of the guilty
15 plea, Speedy Trial Act time will be calculated consistent with 18
16 U.S.C. § 3161(i).

17 7. The date of the sentencing is **Friday, February 09, 2018, at 9:30 a.m.**
18 in **RICHLAND.**

19 8. If a sentence of incarceration is imposed, Defendant shall be placed in
20 custody at the time of sentencing. Sentencing will be scheduled for a

1 total of forty-five (45) minutes. If it is believed that the sentencing
2 hearing will last longer, counsel shall contact Chambers within
3 fourteen (14) days of disclosure of the presentence investigation
4 report. Pending sentencing, Defendant's detention status or release
5 status shall remain pursuant to this court's previous order. The United
6 States Probation Office shall prepare a timely presentence
7 investigation report that will comply with the following schedule:

- 8 1. Not less than **thirty-five (35) days** prior to the sentencing
9 hearing, the probation officer shall disclose the pre-sentence
10 investigation report to the Defendant, counsel for Defendant,
11 and the Government.
- 12 2. Within **fourteen (14) days** of the disclosure of the pre-sentence
13 investigation report, counsel shall communicate in writing to the
14 probation office any objections they may have as to factual
15 errors or omissions; sentencing classifications; sentencing
16 guideline ranges; and policy statements contained in or omitted
17 from the report. Such communication may be oral initially but
18 shall immediately be confirmed in writing to the probation
19 officer and opposing counsel.
20

3. Also within **fourteen (14) days** of disclosure of the presentence investigation report, counsel shall file and serve all motions and memoranda pertaining to Defendant's sentence, including motions for downward or upward departures. Counsel shall utilize the following format when preparing initial memoranda which are limited to twenty pages (absent prior Court permission to file an overlength brief): I. Base Offense Level & Enhancements, II. Departures, III. 18 U.S.C. 3553(a). Under the "Base Offense Level & Enhancements" section, counsel shall discuss whether the PSIR's Total Offense Level calculations (not including departures) are correct or incorrect, providing legal authority for the party's position. Under the "Departure" section, counsel shall discuss whether a downward and/or upward departure is warranted under the Guidelines and provide legal authority for such position. Under the "18 U.S.C. 3553(a)" section, counsel shall discuss whether the resulting guideline range provides a reasonable sentence sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. 3553(a)(2), considering the other factors listed in 3553(a). The parties are limited to one reply of no more than 7

1 pages. No other pleadings are allowed without advance
2 permission of the Court. **FAILURE TO FILE AND SERVE**
3 **A MOTION FOR DOWNWARD DEPARTURE WITHIN**
4 **14 DAYS OF RECEIPT OF THE PRESENTENCE**
5 **INVESTIGATION REPORT WILL BE DEEMED A**
6 **WAIVER OF THE RIGHT TO DO SO.** The time frame for
7 filing and serving responses to such motions shall be governed
8 by Local Criminal Rule 45. Any request with regard to self-
9 reporting shall be made to the probation office at the same time
10 any objections/motions are filed.

11 4. After receiving counsel's objections, the probation officer shall
12 conduct any further investigation and make any revisions to the
13 presentence report that may be necessary. The probation officer
14 may require counsel for both parties to meet with the officer to
15 discuss unresolved factual and legal issues, and counsel shall
16 make themselves available for that purpose.

17 5. At least **ten (10) days** prior to the date of the sentencing hearing
18 the probation officer shall submit the presentence report to the
19 sentencing judge. The report shall be accompanied by an
20 addendum setting forth any objections counsel may have made,

1 including those that have not been resolved, together with the
2 officer's comments and recommendations thereon. The
3 probation officer shall certify that the contents of the report
4 other than sentencing recommendations, including any revisions
5 or addenda, have been disclosed to counsel for Defendant and
6 the Government, and that the addendum fairly states any
7 remaining objections.

8 6. Except with regard to any written objection made under
9 subdivision (a), the report of the presentence investigation and
10 computations shall be accepted by the Court as accurate. For
11 good cause shown, however, the court may allow a new
12 objection to be raised at any time before the imposition of
13 sentence. In resolving disputed issues of fact, the court may
14 consider any reliable information presented by the probation
15 officer, Defendant, or the Government.

16 7. Nothing in this rule requires the disclosure of any portions of the
17 presentence report that are not disclosable under Rule 32 of the
18 Federal Rules of Criminal Procedure.


19 8. The presentence report shall be deemed to have been disclosed
20 (1) when a copy of the report is physically delivered; or (2) one

1 day after the availability of the report for inspection is orally
2 communicated; or (3) three days after a copy of the report, or
3 notice of its availability is mailed to counsel, whichever date is
4 earlier.

- 5 9. Following sentencing, Defendant shall be taken into the custody
6 of the United States Marshal Service unless (1) Defendant has
7 been released prior to sentencing, (2) Defendant specifically
8 requests the opportunity to self-report, and (3) Defendant
9 demonstrates that he is a candidate for self-reporting. If
10 Defendant requests the opportunity to self-report, Defendant
11 must demonstrate the financial ability to travel to a facility on
12 the East Coast.

13 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this order and
14 to provide copies to counsel, the U.S. Probation Office, the U.S. Marshals Service,
15 and Magistrate Judge Dimke.

16 **DATED** this 9th day of November 2017.

17 
18 SALVADOR MENDEZ, JR.
19 United States District Judge
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